RETHINKING THE NEGATIVE EFFECT OF KOMPETENZ-KOMPETENZ

PROPOSAL FOR A RESTRICTIVE APPROACH

PROGRAMME: MASTER OF TRANSNATIONAL LAW

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1. INTRODUCTION

In an ideal world, international arbitration would be governed by a truly internationalised regime, freed from the internal constraints of national laws. International awards would be controlled according to international standards, defining, amongst other matters, the limits of international public policy and establishing the thresholds for the existence and validity of the arbitration agreement. Autonomous sources of transnational law would govern arbitral procedure, the powers of arbitrators and the effectiveness of international arbitral awards. In addition, transnational bodies, similar to national courts, would be entitled to control and execute an arbitral award in any national legal jurisdiction. International commerce and arbitration would have established their own and autonomous transnational legal order.[1]

Even though such an autonomous order has not yet been created, international arbitration has gained considerable autonomy from individual national jurisdictions. We follow the view that international arbitration case law has developed, by way of custom, general principles applicable to international arbitration, which form part of a truly transnational law of arbitration.[2] One of these principles, relates to the arbitrators' powers to decide on their own competence, the so-called Kompetenz-Kompetenz principle.[3] Even though this principle is currently widely accepted by the international community and has been adopted by almost every modern international arbitration law, the question of Kompetenz-Kompetenz has not always been undisputed.

The underlying historical controversy was the following. If the powers of arbitrators necessarily relied, in first instance, on a valid and operative arbitration agreement, which submitted the parties' dispute to arbitration and ousted the jurisdiction of national courts, an

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[1] For a view on the transnationalisation of international commercial arbitration, see Dalhuisen (2016).

[2] Lima Pinheiro (2005), p. 444.

[3] See Texaco preliminary award: "It is for the Sole Arbitrator to render a decision on his own jurisdiction by virtue of a traditional rule followed by international case law and unanimously recognised by the writings of legal scholars." (Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic, YCA 1979, at 177 et seq.).

objection to arbitrators' jurisdiction would ultimately challenge the very premise of their decision-making powers. Thus, arbitrators would not be entitled to assess their own jurisdiction. In this context, the acceptance of Kompetenz-Kompetenz has proven that arbitrators' powers cannot be exclusively explained with reference to the arbitration agreement.

In turn, a totally different concept is the so-called "negative effect" of the Kompetenz-Kompetenz principle, which is gaining evermore acceptance in many national legal orders.[4] According to such negative effect doctrine, courts should give arbitrators priority to decide on their own jurisdiction. The New York Convention does not provide any guidance on that matter. Under its provisions, an arbitration agreement will oust the jurisdiction of national courts, unless it is "null and void, inoperative or incapable of being performed".[5]

In fact, a court may have doubts as to whether the arbitration agreement has ousted its own jurisdiction when the claimant argues, for example, that the arbitration agreement has not been validly agreed (v.g. due to misrepresentation or duress in relation to the arbitration agreement), has never come into existence (v.g. due to lack of consent by the parties), is formally or materially invalid (is not in writing or violates mandatory provisions), or that the disputed issue is not within the scope of the arbitration agreement.[6]

In that case, the French courts, which first developed the concept of the negative effect,[7] will under certain circumstances not examine any jurisdictional objection and decline their jurisdiction almost immediately. However, the precise scope and content of this negative effect has always been subject to great debate by the international community. For instance, the German courts do not recognise the negative effect doctrine and decide any objection to jurisdiction at the outset of the dispute, without giving arbitrators the opportunity to have the first word on the issue. In turn, England adopted an approach in which the courts will generally take the particular circumstances of the case into account in order to decide whether

[4] Brekoulakis (2009), p. 250.

[5] Article 2(3).

[6] Varady, Barceló, Kröll & Mehren (2015), p. 125.

[7] See Gaillard & Savage (1999), pp. 395-396. The principle is applied in France as early as 1949.

an objection to jurisdiction should be decided by a court or instead be referred to arbitration. In turn, US case law will analyse the parties' presumptive intentions regarding who should have primary power to decide jurisdictional objections.

In sum, the different approaches taken by national courts are an expression of each country's unique policy preference. Since the New York Convention has not defined any mandatory rules on this matter, countries are free to adapt their procedural laws according to their own views and interests. Some countries want to guarantee that jurisdiction of arbitrators is subject to immediate and full judicial review, while others seem to favour preventing arbitration from being obstructed by long and costly judicial proceedings at the outset of the dispute.[8]

In this context, the purpose of this master thesis will be to perform a critical assessment of the different approaches taken by national jurisdictions on the negative effect doctrine and analyse the merits of the underlying policy preferences. In the final chapter, we will present our own view on the negative effect of the Kompetenz-Kompetenz principle and will suggest alternative methods for improving the efficiency of arbitral proceedings.

2. KOMPETENZ-KOMPETENZ AND THE AUTONOMY OF THE ARBITRATION CLAUSE

2.1 The various meanings of Kompetenz-Kompetenz

2.1.1 Positive effect of Kompetenz-Kompetenz

As we already mentioned above, arbitrators have the power to decide on their own jurisdiction once a jurisdictional objection is raised during arbitral proceedings, as a transnational principle of international arbitration. This power is also commonly referred as the "positive effect" of Kompetenz-Kompetenz.[9]

The position adopted as the legal fundament basis of this principle is strongly related to the more general view adopted regarding the arbitrators' powers. Legal scholars who take the view that arbitrators' powers are defined by party autonomy and the arbitration agreement will probably argue that the basis of Kompetenz-Kompetenz is the presumed intention of the

[8] Barceló (2017), p. 2.

[9] It also known as "competénce-compétence" (France) or "competence-competence".

parties to confer arbitrators the power to upon all aspects of their dispute.[10] Localists, according to which international arbitration would necessarily be based on the *lex arbitri,* or a set of national laws, derive Kompetenz-Kompetenz from the arbitration law of the country where the arbitration is held (l*ex arbitri*), or more generally, the laws of all countries liable to recognise an award on jurisdiction.[11] In our view, this principle is a customary principle of transnational law of arbitration consistently held by international arbitration case law and promoted by the need to confer stability to arbitral proceedings.[12]

Thus, the effectiveness of Kompetenz-Kompetenz would not depend on an express provision of the *lex arbitri*. Even if we imagine the extreme case in which an arbitral award is annulled at the seat, because Kompetenz-Kompetenz violates mandatory provisions of the *lex arbitri,* there would be certainly very few countries (if any) ready to refuse recognition and enforcement of an international arbitral award on such ground.[13] Notwithstanding, it cannot be denied that the execution of the arbitral awards' legal effects is still dependent on the attitude taken by the country in which the award is sought enforcement. A recognising country with a parochial view towards international arbitration will still be able to refuse enforcement of an arbitral award if it finds the latter to be against its domestic public policy (see article V(2)(b) of the New York Convention). Since international arbitration is dependent on national enforcement mechanisms, which are still able to deny recognition by applying purely domestic standards of control, we cannot argue that an autonomous transnational legal order exists. The absence of this order does, however, not affect the existence of autonomous principles of transnational law (v.g. due process), which are binding on arbitrators even if these principles are not adopted by the *lex arbitri* or other national laws.[14]

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[10] Poudret & Besson (2007), p. 386.

[11] Gaillard & Savage (1999). p. 399.

[12] See also Dalhuisen (2016).

[13] Annulment at the country of the seat has no mandatory extraterritorial effect under article 5(1)(e) of the New York Convention.

[14] Lima Pinheiro (2005), p. 445.

2.1.2 Binding Kompetenz-Kompetenz

Nonetheless, the original meaning of Kompetenz-Kompetenz was different than the one described above. In fact, with the signing of the Westphalia peace treaties (1648) and the rise of modern state theory, German scholars referred to Kompetenz-Kompetenz as the sovereign's authority to define its own powers.[15] Later, under the premise of the principle of the separation of powers, the judiciary was given total independence from the "executive power" and courts were granted the power to decide on their own competence with binding effect on all other state entities[16]. If we applied this concept to arbitration, arbitrators would have the power, *per se*, to decide upon a jurisdictional objection with finality, without subsequent court review. Kompetenz-Kompetenz would be inherent to the arbitrator's power to decide on the merits of the dispute and would not depend on a prior agreement between the parties. It can be argued that Germany granted arbitrators, at least for some years, with binding Kompetenz-Kompetenz.[17] Currently, to the best of our knowledge, no country grants an arbitration tribunal this power.

2.1.3 Negative Kompetenz-Kompetenz

Our work will deal in greater detail with the third meaning of Kompetenz-Kompetenz, called the negative effect of Kompetenz-Kompetenz. This effect was historically developed in France and corresponds to the rule whereby arbitrators must have the first opportunity to hear challenges relating to their own jurisdiction.[18] According to Gaillard & Savage, the negative effect of Kompetenz-Kompetenz rests upon the principle that there are no grounds to suspect that arbitrators will not be capable of rendering decisions regarding the applicable jurisdiction that are fair and protect the interests of society, as well of those of the parties to arbitration.[19]

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[15] Menezes Cordeiro (2015), p. 191.

[16] Section 17 of the *Gerichtsverfassungsgesetz* (1877), the German Law of Judicial Organization.

[17] BGH 14.05.1952, Az.: II ZR 276/51.

[18] Gaillard & Savage (1999), p. 395.

[19] Gaillard & Savage (1999), p. 399-400.

2.2 The different scopes of application

Differences between the various meanings of Kompetenz-Kompetenz can best be highlighted in the three-stage schema of the arbitral proceedings, used by Barceló:[20]

- **Stage 1**: Takes place before a state court. One of the parties to the dispute brings an action in national courts and the respondent raises the arbitration agreement as a defence, seeking referral to arbitration. Arbitration proceedings may already have commenced. However, no award has been rendered yet by arbitrators. The **negative effect** question arises at this stage. Countries enforcing the negative effect of Kompetenz-Kompetenz are likely to let arbitrators decide first on their jurisdiction. Other countries will prefer the jurisdictional dispute to be resolved by the court at the outset of the judicial proceedings.
- **Stage 2**: Takes place before an arbitrator. One of the parties has initiated arbitral proceedings and the respondent objects to the arbitration tribunal's jurisdiction. At this stage the **positive effect** of Kompetenz-Kompetenz comes into play. Most countries entitle arbitrators to take a decision on their jurisdiction, which is subject to subsequent court review.
- **Stage 3**: Takes place before a national court. An arbitral award on jurisdiction has been rendered in Stage 2, either by way of a preliminary award or as a final award together with the decision on the merits. Stage 3 refers to the proceedings in which one of the parties applies for setting aside of the arbitral award or has opposed its enforcement on the grounds of lack of jurisdiction. Under the original meaning of **binding Kompetenz-Kompetenz**, arbitrators would have the power to decide the jurisdictional dispute with finality at stage 2, i.e. without court review at stage 3.

2.3 Separability of the arbitration agreement

The analysis of the Kompetenz-Kompetenz principle normally brings up the subject of the separability of the arbitration agreement. Just as Kompetenz-Kompetenz, the principle of separability has become a customary principle of transnational arbitration law.[21]

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[20] Varady, Barceló, Kröll, & Mehren, A. (2015), pp. 124-125.

[21] Dalhuisen (2016), p. 66.

Both principles have the purpose of strengthening the arbitral jurisdiction. However, they are two distinct concepts with different practical effects.[22]

While Kompetenz-Kompetenz assures stability to the arbitration proceedings whenever jurisdiction is called into question, the principle of "separability" protects the arbitrators' power to decide upon the merits of the dispute.

According to the separability principle, the invalidity of the main contract does not automatically affect the validity of the arbitration clause. Since the arbitration clause is considered a separate agreement from the main contract, an invalid container contract will not automatically compromise the jurisdiction of the arbitration tribunal. As a result, arbitrators have jurisdiction to render the main contract null and void. In the absence of the separability principle, a tribunal would be obliged to deny jurisdiction every time it found the underlying contract to be invalid.

The UNCITRAL Model Law joins both the Kompetenz-Kompetenz principle (positive effect) and the separability principle in the same provision. Hence, article 16(1) states that:

> "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

However, in some cases the arbitration agreement may be affected by the invalidity or inexistence of the main agreement. For this reason, some authors prefer to use the concept of "severability", instead of separability or autonomy of the arbitration clause.[23] In this regard, Barceló advocates for the view that challenges to the existence of the main agreement (as opposed to its validity) would, as a rule, implicitly challenge the existence of the arbitration

[22] Lew, Kröll & Mistelis, L. A. (2003), p. 334.

[23] See Mayer (1999).

agreement.[24] In fact, if one of the parties to arbitration alleges it never accepted the contractual offer made by the other party, the arbitration clause has not been agreed to, any more than any of the other clauses of the main contract.[25]

2.4 Policy considerations: efficacy v. legitimacy

The negative version of Kompetenz-Kompetenz is often described as an important instrument to promote the efficacy of arbitral proceedings. It would minimise the opportunities for a recalcitrant party to obstruct arbitration. Countries which implement the negative effect doctrine normally claim that their approach should be seen as an evidence of their "pro-arbitration" bias[26] and as important element of their "modern" arbitration laws.

The concern for efficacy has become very common in the international debate surrounding negative effect, thereby undermining the theoretical and practical implications of this principle. It is often ignored that the negative effect implies a restriction of the powers of national courts.[27] The negative effect limits the court's obligation to review the arbitration agreement and, therefore, also its capacity to assess its own jurisdiction. Despite the doubt whether parties actually agreed to arbitrate, the negative effect sets out a sort of presumption of validity of the arbitration agreement in order to avoid dilatory proceedings. Therefore, a low threshold is set for an arbitration agreement to produce legal consequences, which may be considered disproportional.[28] Finally and most importantly, granting arbitrators the first word on jurisdiction will force parties, who have not agreed to arbitrate, to participate in arbitral proceedings, being unfairly denied their day in court. All these factors lead us to question whether the legitimacy of arbitral proceedings can be reconciled with a strong negative effect doctrine.

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[24] Barceló (2017), p. 17.

[25] Mayer (1999), p. 263.

[26] See Gaillard (2011).

[27] Brekoulakis (2009), p. 239.

[28] *Ibidem*.

In contrast, positive Kompetenz-Kompetenz is based on sound policy grounds. As Stavros Brekoulakis has correctly said, "it cannot be left to the whims of the parties to derail the arbitration proceedings and undermine the authority of the tribunal, merely by alleging that the arbitration agreement is invalid".[29] In addition, it does not affect the jurisdiction of national courts. A regime of concurrent jurisdiction is established where both national courts and arbitral tribunals have an autonomous right to examine the validity and existence of the arbitration agreement.

As we will see in our comparative law analysis, the tension between legitimacy and efficacy is inherent to all the different approaches taken by countries to regulate the allocation of powers between arbitrators and courts.

3. NEW YORK CONVENTION

The most prominent international convention on international arbitration is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention (1958). To date, the New York Convention has been signed by 159 parties and is therefore of the utmost importance for almost every discussion concerning international arbitration.[30] Article 2(3) of the Convention states that a court shall at stage 1, at the request of one the parties, refer the parties to arbitration, "unless it finds that the said agreement is null and void, inoperative or incapable of being performed". As we will confirm below, a similar phrase is used in many national arbitration laws.

Generally, an arbitration agreement will be null and void when it has not been validly agreed, or is formally or materially invalid (for example, it has not been made in writing or it violates other mandatory provisions). The term "inoperative" refers, amongst other matters, to cases where a valid arbitration agreement has been entered into by the parties, but which has meanwhile lost its effect. For example, it applies when the arbitration agreement has been terminated by the parties.[31] Lastly, "incapable of being performed" refers to cases where arbitration cannot be commenced, due for example to the refusal of an appointed arbitrator to

[29] *Idem*, p. 251.

[30] Information available at: http://www.newyorkconvention.org/countries (last accessed on 27 June).

[31] Lew, Kröll & Mistelis (2003), p. 341-345.

act in that capacity.[32] The question whether a certain dispute is contemplated by the scope of the arbitration agreement is not mentioned in article 2(3).[33] In fact, the exact meaning of this provision was not discussed during the preparations of the New York Convention.[34] However, a truly internationalised regime of arbitration would require that the abovementioned terms ("void, inoperative or incapable of being performed") are given an autonomous interpretation, with reference to international standards and the exclusion of national idiosyncrasies.[35] Only such an autonomous interpretation could foster the creation of a truly transnational legal order of arbitration and international commerce.[36]

In addition, article 2(3) does not mention whether national courts should apply a *prima facie* standard, or, alternatively, perform a full review on the arbitration agreement. Although the wording of the provision suggests that a full review was meant by the drafters, the dominant position on the matter is that the Convention does not compel national courts to perform a mandatory judicial scrutiny of the arbitration agreement at stage 1.[37] National courts would not be deterred by the New York Convention from referring the parties to arbitration without prior review of the arbitration agreement. Even if courts perform such a review, national legislators are free to regulate the applicable standard of review, choosing between a *prima facie* or a *de nov*o review.

4. UNCITRAL MODEL LAW

The UNCITRAL Model Law has been a great success in modernising and harmonising international arbitration laws of countries all over the world.[38] More than 100 jurisdictions

[32] *Ibidem*.

[33] *Ibidem*.

[34] Lew, Kröll & Mistelis (2003), p. 341-345.

[35] *Ibidem*.

[36] See Dalhuisen (2016).

[37] Born (2009), p. 857-861.

[38] Blackaby & Partasides (2015), p. 61-62.

have enacted arbitration laws based on the provisions of the Model Law by either adopting the full text, or introducing some changes, such as Germany, England and Portugal.[39]

Adopting a provision similar to article 2(3) of the New York Convention, the Model Law leaves the question regarding the negative effect open. At stage 1, a court shall refer the parties to arbitration "unless it finds that the agreement is null and void, inoperative or incapable of being performed" (article 8(1)). Again, just like we mentioned apropos the New York Convention, the natural meaning of the words strongly suggests that a full review was meant. The drafters' intention on this matter is confirmed by the Model Law's legislative history. In fact, a proposal was rejected which would have expressly provided for a *prima facie* review.[40] According to that proposal, a court would have to refer the parties to arbitration, unless it found that the agreement was "manifestly null and void". As Gary Born stated, "the rejection of this language was particularly significant given that it was precisely parallel to that in the (then) recently-adopted 1980 French Code of Civil Procedure, which provided for only prima facie judicial review". [41]

As a conclusion, the Model Law does not add anything to what was already provided by the New York Convention. However, the Model Law has introduced rules which are important for the discussion regarding the allocation of powers between courts and arbitrators. These provisions deserve, therefore, our attention. These solutions relate to (***i***) the rendering and challenge of preliminary awards on jurisdiction, (***ii***) the possibility for arbitral proceedings to be commenced or continued while a judicial challenge to arbitrators' jurisdiction is pending and (***iii***) the introduction of time limits for raising jurisdictional objections.

4.1.1 Preliminary award on jurisdiction

Article 16(3) refers that an arbitral tribunal may rule "as a preliminary question that it has jurisdiction". German arbitration law, for example, has gone beyond the text of article 16(3) and provides that arbitrators should "in principle" (*in der Regel*) decide jurisdiction by way of a preliminary award.

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[39] *Ibidem*.

[40] Barceló (2017) pp. 6-8.

[41] Born (2009), p. 882.

It is undisputed that a preliminary award on jurisdiction has many benefits. An arbitration tribunal will at an early stage of the proceedings define its jurisdiction and in case of a negative decision costs and time may be saved. In turn, a well-reasoned award may in some cases clear up the doubts of the party objecting to jurisdiction. Nonetheless, preliminary awards will be limited to those cases in which arbitrators are capable of separating jurisdiction from the decision on the merits (v.g. if the decision on jurisdiction raises only points of law).

The Model Law does also provide that any party may challenge a preliminary award in court, which decision shall be subject to no appeal. Some authors argue that the right to challenge a preliminary award should be seen as an argument for courts to give arbitrators greater priority on jurisdictional issues. Apparently following this line of thought, Barceló argues that "the drafters have provided for an approach that harmonizes well with a prima facie test at stage 1. That is because it provides for a fairness/procedural efficiency counterbalance – in the form of early judicial review of a preliminary ruling".[42] Hence, a preliminary challenge would entitle a party objecting to the jurisdiction of arbitrators to obtain judicial relief at an early stage of the arbitration proceedings. Besides, an award annulled at the seat of arbitration would generally not be enforced by any national court under the New York Convention.[43] Thus, damage caused to a party, who had not agreed to participate in the arbitral proceedings, would be more likely kept within reasonable limits.

In our view, the possibility to challenge a preliminary award cannot *per se* justify a negative approach doctrine. The reason is primarily related to the fact that a preliminary challenge will only be possible in those cases where arbitrators may separate their analysis on jurisdiction from the one related to the merits of the dispute. Due to this uncertainty, the right to challenge a preliminary award will not guarantee parties a right to early judicial review and can therefore not be seen as a satisfactory remedy to solve the legitimacy problems posed by the negative effect doctrine.

[42] Barceló, (2017), p. 7.

[43] *Idem*, p. 10.

4.1.2 Concurrent jurisdictions

Article 16(3) does also provide that arbitral proceedings may continue while a preliminary award is being challenged in court, having courts and arbitrators concurrent jurisdictions. This rule is particularly important in fostering arbitration in cases where arbitrators are confident about their award on jurisdiction. In these cases, arbitrators will continue the proceedings and promote the rendering of a final award. Even if their award on jurisdiction is annulled at the seat, they may still consider rendering a final award if they find that a third country will recognise and enforce the award.[44] Article 16(3) is therefore an important statement regarding the autonomy of international arbitration in relation to the law of the seat.

Similarly, article 8(2) is a very important provision for the debate on the negative effect doctrine. According to the latter norm, arbitral proceedings may be commenced or continued while court proceedings are pending at stage 1. Thus, arbitral proceedings are not necessarily delayed by the mere that legal action has been brought in court. Consequently, it is not correct to assert that arbitration proceedings would be delayed in the absence of a strong negative effect provision. Even though full court proceedings are likely to rise the costs of litigation, costs cannot be used as a valid argument to restrict one's fundamental right to access to court.

4.1.3 Time-limits for raising objections

Lastly, time-limits to challenging an arbitral tribunal's jurisdiction are an effective method to avoid "last resort" challenges, limiting the field of action of a party pursuing dilatory tactics. On this matter, article 16(2) provides that a plea at stage 2 that an arbitral tribunal does not have jurisdiction shall be raised no later than in the submission of the statement of defence.[45] Similarly, the plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

These provisions must be read in light of Article 4 of the Model Law. According to this provision, failure to comply with these limits will be deemed as waiver to the right to object.

[44] Annulment at the country of the seat has no mandatory extraterritorial effect under article 5(1)(e) of the New York Convention.

Thus, most countries will find that a party will be estopped from challenging a final award on grounds of jurisdiction if it has not either (***i***) raised the objection under the defined time limits, or (***ii***) challenged the preliminary award.

5. NATIONAL LAWS

The following comparative law analysis will assess how different jurisdictions allocate the powers between arbitrators and courts on the matter of jurisdiction. As a preliminary remark, it should be told in advance that every country, with the exception of Germany, has to a certain degree implemented some version of the negative effect doctrine.[46] Nonetheless, national provisions and case-law diverge on many aspects, such as (***i***) the degree of priority given to arbitrators, (***ii***) the timing of the judicial review, (**iii**) the standard of the judicial review, or (***iv***) the role of party autonomy.

Some countries will perform a full review on the arbitration agreement (Germany), while others will only conduct a limited *prima facie* review, or refuse to perform any review at all (Portugal and France). According to a third approach, courts will take into account the parties' presumptive or expressed intentions regarding who should decide the jurisdictional objection (USA). Lastly, courts may ponder several criteria before deciding who should have the first word on jurisdiction (England).

5.1 Germany

As already explained in chapter 2, the concept of binding Kompetenz-Kompetenz was developed in Germany. Under its strongest version, arbitrators would have the power, *per se*, to decide a jurisdictional objection with finality, i.e. without a comprehensive court review.

Interestingly, for the most part, scholars and jurisprudence have denied arbitrators even the power to decide about their competence at stage 2, i.e. the positive effect of Kompetenz-Kompetenz. In the 19th century, Prussian courts have consistently held that courts had the exclusive power to decide on the jurisdiction of the arbitration tribunal.[47] The same stance

[46] Brekoulakis (2009), p. 245-246.

[47] Menezes Cordeiro (2015), p. 194.

was adopted throughout Germany's imperial period (1871-1918).[48] Thus, parties could derail arbitration proceedings by simply raising an objection to arbitrators' jurisdiction.[49]

However, at a time where international commerce significantly grew, parties had no significant alternatives to arbitration in order to resolve their disputes. So, in the 1930s, the idea gained support that parties could enter into a separate agreement which conferred arbitrators binding Kompetenz-Kompetenz, a power traditionally vested in the courts.[50] In particular, the courts have held that once an arbitration clause conferred the power upon arbitrators to decide "any dispute" related to a defined legal relationship, it should be interpreted that arbitrators would also have the power to decide about their own competence (*Zuständigkeit*) with finality, in the same way as regarding the merits of the case. This interpretation would in fact be very akin to an inherent binding Kompetenz-Kompetenz.

However, it did not take long until courts and scholars agreed that arbitrators' Kompetenz-Kompetenz could not be limitless.[51] Arbitrators should only have Kompetenz-Kompetenz if the parties had expressly conferred that power upon them in the arbitration clause, or by a separate "Kompetenz-Kompetenz" clause".[52] This approach was generally confirmed by later decisions of the BGH[53] and adopted in Germany until it adapted its arbitration regime to the provisions of the Model Law (1997)[54]. As from this moment on, German courts performed always a full review to control the jurisdiction of arbitrators. The arbitrators' decision on jurisdiction was not final anymore. At the present day, Kompetenz-Kompetenz clauses are deemed void. It is considered not to be within the disposition of the parties to limit the judicial

[48] Ahrendt (1996), p. 13.

[49] Menezes Cordeiro, (2015), p. 194.

[50] Ahrendt (1996), p. 21.

[51] Menezes Cordeiro, (2015), p. 195.

[52] Ahrendt (1996), p.19-20.

[53] See Brehm (2005).

[54] *Schiedsverfahrenneuregelungsgesetz*, 22 December 1997.

review of arbitrators' jurisdiction. In this regard, party autonomy would disrespect German public order.[55]

Currently, Germany has procedural rules in place which allow parties to seek a full judgment on the jurisdiction of arbitrators, at every stage of the arbitral proceedings. According to German authors, the rationale is to assure parties legal certainty.[56]

5.1.1 Rejection of the negative effect doctrine

Section 1032(1) of the German ZPO (*Zivilprozessordnung*) provides that a court faced with an objection to the arbitral tribunal's jurisdiction shall "reject the action as inadmissible, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed".[57]

German courts reject the negative effect doctrine. They perform a full review on arbitrators' jurisdiction and render a judgment (*Urteil*) at stage 1, without giving any priority to arbitrators.[58] Consequently, if a court finds that arbitrators have good jurisdiction, the action is immediately rejected as "inadmissible" (*unzulässig*). Therefore, a stay of proceedings, such as is envisaged in the Model Law, will not occur. This rule does also apply when arbitration proceedings have already been commenced. Thus, a party may go to court and bring a legal

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[55] Ahrendt (1996), p. 25.

[56] See Huber & Bach (2015b). It is striking that the BGH's obvious quest for legal certainty of the arbitral proceedings has in some cases defeated its own purpose of assuring the clarity and foreseeability of the parties' rights and duties in arbitration. For example, the BGH considered that a court judgment denying the arbitral tribunal's preliminary award, under section 1040(3), will not turn *ipso iure* void a final award already rendered by arbitrators. According to the BGH, the legal certainty of the ZPO's challenge system requires an award (on the merits) only to be set aside under a proceeding under section 1059 and not *ipso iure* as a result of an interlocutory challenge to the arbitral tribunal's preliminary award. It seems that legal certainty would be better served if the arbitral award would be annulled at the seat regardless whether that judgment was delivered at stage 1, by way of an interlocutory challenge to a preliminary award, or in a set aside proceeding.

[57] Translation available in Huber & Bach (2015b). In turn, section 1040(1) provides for positive Kompetenz-Kompetenz. An arbitral tribunal may rule on its own jurisdiction and "in this connection on the existence and or validity of the arbitration agreement".

[58] Huber & Bach (2015b), p. 117.

action on the merits of the dispute, at any time of the arbitral proceedings. If the defendant raises the arbitration agreement as a defence, the court will review the arbitration agreement *de novo*.[59]

The ZPO also establishes that a party may file a special application (*Antrag*) with the purpose to determine whether or not arbitration is admissible.[60] This provision is not based on the Model and corresponds to a similar rule which existed in German arbitration law before the 1998 reform. Reasons related to procedural economy and to the possibility for a party to obtain a prior declaration regarding the admissibility of arbitration have been put forward to keep this rule after the reform.[61] However, parties may file such application only prior to the constitution of the arbitral tribunal. Some authors argue this limit could be seen as an element of negative effect.[62] However, the provision must be put in the context of the other procedural rights available to the parties. An action on the merits will be available at any time. The negative effect is, for this reason, very limited.

The common critic made to German law is that it gives plenty of opportunities for a party to delay and obstruct the efficacy of arbitration proceedings. However, as we mentioned before, such argument is rather weak considering that section 1032(3) of the ZPO grants arbitrators concurrent jurisdiction, allowing them to continue arbitral proceedings while judicial review is pending. Commentators also argue that early legal certainty will not be achieved, since judgments are normally subject to appeals. Thus, it may take several years until a judgment is rendered with *res judicata* effect.[63] However, the same will happen with any other court review on jurisdiction, both under a set aside or recognition and enforcement proceeding. The only difference is that court proceedings at stage 1 would start sooner and therefore probably deliver a binding judgment earlier in time. In addition, it must be noted that normally a party objecting jurisdiction will bring a court action in the country where the defendant has its

[59] Born (2009), p. 909.

[60] See Section 1032(2).

[61] See Huber & Bach (2015b).

[62] Brekoulakis (2009), p. 245-246.

[63] Ahrendt.(1996), pp. 6-8.

assets, which will probably also be the country in which recognition and enforcement of the award would be eventually sought. A final judgment with *res judicata* effect in that country can be more determinant for the outcome of the award than control at the seat, which has no mandatory extraterritorial effect under article 5(1)(e) of the New York Convention.

In sum, Germany has a very guarantee-based system which emphasises the need to preserve the legitimacy of arbitral proceedings. German public order requires that parties are able to prompt exercise of their constitutional right to a "lawful judge". In addition, it is advocated that any restriction to court review regarding arbitrators' competence must be seen as a violation of the principle of rule of law.[64]

5.2 France

5.2.1 Strong negative effect

France is considered to be a country with a "pro-arbitration" attitude, as it is the home country to the concept of the negative Kompetenz-Kompetenz, or "*compétence-compétence*". It is one of the few examples, along with Portugal, that have a clear rule on the matter. [65]

Article 1448 of the French CCP (Code of Civil Procedure) provides the following:

> "(1) Where a dispute covered by an arbitration agreement is filed before a State court, the latter shall decline jurisdiction unless (i) the dispute has not yet been submitted to the arbitral tribunal and (ii) the arbitration agreement is manifestly void or manifestly inapplicable.
>
> (2) A court may not decline jurisdiction on its own motion.
>
> (3) Any stipulation contrary to the present article shall be deemed not written."[66]

[64] Ahrendt (1996), p. 25.

[65] Article 1465 establishes the positive effect of Kompetenz-Kompetenz: "The arbitral tribunal has exclusive jurisdiction to rule on objections to its jurisdictional power.".

[66] Translation available in Bensaude (2015).

Arbitration law in France is not based on the Model Law and has a dualist approach, i.e. the law distinguishes between domestic and international arbitration.[67] Article 1448, for instance, was originally applicable only to purely domestic arbitrations. However, the French Supreme Court (*Cour de Cassation*) extended its application to international arbitration in various landmark cases, such as in *Jules Verne.*[68] In 2011, France adopted a new law on arbitration and expressly provided that unless parties agreed otherwise, paragraphs 1 and 2 of Article 1448 applied to international arbitration.[69] As we will discuss below, no reference is made to paragraph 3.

French law adopts a two-fold standard to address the negative effect of Kompetenz-Kompetenz. The degree of priority given to an arbitral decision over a dispute covered by an arbitration agreement is dependent on whether the dispute has already been submitted to an arbitration tribunal. The strongest version of Kompetenz-Kompetenz takes place when the arbitration tribunal has already been constituted[70]. The inherent logic is that a claim that goes to court before arbitration is less likely to be in bad faith.[71] In this case, the French courts will, without any prior review, decline jurisdiction and refer parties to arbitration. If, however, an arbitration tribunal has not been previously constituted, the French state courts perform a limited *prima facie* review in order to assess whether the arbitration agreement is "manifestly" void or inapplicable.

French case law performs a very narrow interpretation, deeming an arbitration agreement "manifestly void" only under rare circumstances. According to the judgment in *Lopez-Alberdi* an arbitration agreement is manifestly void when there is not any possibility that the validity of the arbitration agreement can be upheld.[72] In turn, an arbitration agreement would be

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[67] See Gaillard (2011).

[68] *Cour de cassation, Copropriété maritime Jules Verne et autres v Société ABS American bureau of shipping*, 07 June 2006.

[69] Article 1506.

[70] Under article 1456 of the French Code of Civil Procedure, a dispute is considered to have been submitted to an arbitral tribunal once all members of the tribunal have accepted the mission entrusted upon them.

[71] Barceló (2003), p. 1127.

[72] *Cour de Cassation, Lopez-Alberdi*, 9 October 2001.

"manifestly inapplicable" when it would be manifest that it did not apply to the dispute. In sum, a court will decline jurisdiction if there is any remote possibility that a valid arbitration agreement has been entered into between the parties and that the latter applies to the dispute at hands.[73] As Stavros Brekoulakis has mentioned, "it would be enough for a clause to mention the word "arbitration" for national courts to refrain from examining whether this reference to arbitration is void or has any meaning at all".

Some authors argue that a strong negative effect at stage 1 is well counterbalanced by a de *novo review* at both set aside[74] and recognition and enforcement proceedings.[75] However, the fact that a party will have full review at stage 3 does not suffice to dismiss the legitimacy concerns we have mentioned earlier. A party who has not agreed to arbitrate may still have to participate in full arbitration proceedings. Furthermore, Dennis Bensaude explains that French courts will only in very rare circumstances deem an arbitration agreement void at stage 3.[76] Since French law does not have formal requirements, courts will examine whether there was a "common intent of the parties".[77] A low threshold will suffice. In fact, common intent will be found where a party accepts by silence the incorporation (v.g. by an confirmation telex or invoice) in the contract of general conditions that contain an arbitral clause.[78]

The main policy behind the French approach is to promote the efficacy of the arbitration proceeding by disallowing any comprehensive court review concerning the existence, scope and validity of the arbitration agreement at stage 1. Again, we do not deny the importance of this policy goal. But efficacy should not deem irrelevant the right of a party, who has not agreed to arbitrate, the right to go to court. It is disproportional and illegitimate to force such party to participate in full arbitration proceedings, when it not clear whether a valid arbitration

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[73] Bensaude (2015), p. 1133-1188.

[74] Article 1520(1) provides that an action to set aside may be available on the ground that the arbitral tribunal has wrongly retained or denied jurisdiction.

[75] Barceló (2017), p. 9.

[76] Bensaude (2015), p. 1133-1188.

[77] *Ibidem.*

[78] *Ibidem*. See *Cour de Cassation, Bomar Oil*, 9 November 1993, and *Cour d'Appel Paris, Comptoir Commercial Blidéen*, 13 September 2007.

agreement exists. Besides, if arbitrators wrongly retain jurisdiction, the party will still have to apply for set aside of the arbitral award, or refuse its enforcement months or years later.[79]

Lastly, in our view, French law should grant courts discretion to under certain circumstances perform a full review on existence, validity and scope issues (v.g. when issues could be decided solely based on the evidence presented in the written statements). In fact, clear-cut rules on how courts should decide at stage 1 will not always foster efficiency. Consider the case in which an arbitral tribunal would not yet have been constituted and the court would have enough evidence to deliver a judgment at the outset of the dispute.

5.2.2 Delocalisation

Finally, it should be mentioned that French law has in many respects adopted a delocalised view of international arbitration.[80] "Delocalisation" means that arbitration should not be subject to control at the seat and be immune to national idiosyncrasies [81] The supervision function should be exclusively exercised by courts of the country in which recognition and enforcement of the award is sought, as the place where the award's practical and legal effects are enforced (v.g. seizure of assets). Even though it is unrealistic to expect that, at least in a near future, countries will abolish their domestic set aside provisions, jurisdictions are increasingly allowing parties to previously waive their rights to set aside proceedings (v.g. France, Belgium, Sweden or Switzerland).[82]

In this context, greater party autonomy is often related to adopting an international concept of public order. In fact, France applies an international standard when it exercises public policy control at a set aside or recognition and enforcement proceeding. An international concept of public policy is narrower than a domestic one. Thus, a breach of domestic public policy may

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[79] Gaillard & Savage (1999), p. 410.

[80] Like the Cour de Cassation has put it, an international arbitral award "does not belong to any state legal system". *Cour de Cassation, Société PT Putrabali Adyamulia v Société Rena Holding et Société Moguntia Est* Epices, 29 June 2007.

[81] Dalhuisen (2016), pp. 413-415.

[82] Poudret & Besson (2007), p. 385.

amount to compliance with international public policy,[83] which may permit greater party autonomy to the parties of international arbitration.

In fact, French arbitration law has expressly provided for greater party autonomy after the 2011 reform. According to the new law, article 1448(3) is not applicable to international arbitration ("*Any stipulation contrary to the present article shall be deemed not written*"). This emphasis on party autonomy clearly suggests that parties can confer the power upon arbitrators to decide on jurisdiction with finality.

5.2.3 Waiver to set aside

In this context, article 1522 of the French Code of Civil Procedure allows parties to waive their right to set aside an award. However, this waiver is subject to a caveat. Paragraph 2 of article 1522 provides that whenever the parties waive their right to file a set aside action under paragraph 1, the parties may still oppose the enforcement of the award in France under the same grounds set forth for a set aside application. Normally, an international award rendered in France can only be challenged through a set aside action. However, if parties waived that right, French courts will still be able to review a challenge to the arbitrators jurisdiction in the enforcement proceeding.[84] In contrast, if parties seek enforcement in another country, French courts will not have performed any review on arbitrators' jurisdiction at stage 3.

The French provision is an innovative solution, which may avoid duplication of judicial proceedings at stage 3 and promote the efficacy of arbitration. However, it does not cope well with the negative effect doctrine. One of the policy arguments given to justify arbitrators' precedence on jurisdiction at stage 1, is that court control could be made by the country of the seat at a later stage, both in preliminary challenge or in a set aside proceeding. However, if parties have waived their right to set aside, then a party will only be able to have jurisdiction fully reviewed by a court at the recognition and enforcement proceedings. In this case, our legitimacy concerns become even stronger.

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[83] Bensaude (2015), p. 1133-1188. *Cour d'appel Paris*, *Intrafor*, 12 March 1985.

[84] *Ibidem.*

5.3 Portugal

In Portugal, international commercial arbitration is governed by the Voluntary Arbitration Law (LAV or *Lei da Arbitragem Voluntária*), enacted by Law no. 63/2011, 14 December. It is a monist law according to which domestic arbitration law provisions shall also apply *mutatis mutandis* to international arbitration.[85]

This Law is based on the provisions of the Model Law, but has introduced many changes to its original text, such as to the rules governing the negative effect of Kompetenz-Kompetenz.[86] In fact, the LAV was in many ways inspired by the French Arbitration Law, even though Portuguese procedural law tradition is heavily influenced by German legal thought. This mix of influences is patent in some solutions envisaged by the LAV.[87]

In regard to the negative effect doctrine, article 5(1) provides that a state court shall, if the respondent so requests, dismiss the case, unless it finds that the arbitration agreement "*is manifestly null and void, is or became inoperative or is incapable of being performed*".[88]

Portuguese courts have consistently performed a very narrow interpretation. Courts consider that an arbitration agreement should be considered manifestly null, inoperative or incapable of being performed (***i***) when it is not necessary to analyse any additional evidence to arrive at this conclusion, when only assessed with regard to its external requisites, such as form and arbitrability;[89] or (***ii***) in the exceptional circumstances in which the defects are so evident that they almost do not need to be demonstrated by the party.[90] Hence, the courts will dismiss the

[85] Article 49. However, Chapter 10 (articles 55 to 58) is only applicable to international arbitration.

[86] Moura Vicente (2014), p. 1

[87] *Ibidem*.

[88] Translation available at: http://www.arbitragem.pt. The positive effect of the Kompetenz-Kompetenz principle is anchored in article 18(1) which provides that the arbitral tribunal may rule on its own jurisdiction, even if for that purpose it is necessary to assess the existence, the validity, the effectiveness and the applicability of the arbitration agreement.

[89] *Supremo Tribunal de Justiça*, 21 June de 2016.

[90] *Supremo Tribunal de Justiça*, 7 July 2016.

case when there is any "plausibility" (*plausibilidade*) that parties have entered into a valid arbitration agreement.[91]

Contrarily to France, Portuguese courts will always perform a *prima facie* review of the arbitration agreement at stage 1, independently of whether the arbitration tribunal has already been constituted or not. At stage 3, courts will perform a *de novo* review.

Just like in France, at stage 3, an agreement will be deemed void under rare circumstances. Article 51 provides a *favor validitatis* rule. Thus, an international arbitration agreement will be considered valid if it complies with the requirements set out either by (*i*) the law chosen by the parties to govern the arbitration agreement, (*ii*) by the law applicable to the subject-matter of the dispute or (*iii*) by Portuguese law.[92] This solution is influenced by the French transnational approach to international arbitration. The purpose is to detach the validity of the arbitration agreement from any parochial national law provision which may deem the agreement invalid and, therefore, render the tribunal incompetent.

In turn, Article 5(4) provides that issues of invalidity, inoperativeness or unenforceability of an arbitration agreement cannot be discussed autonomously in a declaratory action at stage 1, nor in an interim measure procedure aimed to prevent the constitution or operation of an arbitral tribunal.[93] The purpose of such provision is to prevent proceedings which solely address whether arbitration proceedings are permissible. Portuguese law therefore excludes parties any recourse to court proceedings before arbitrators have decided on jurisdiction, based on the premise that it is more important to deter dilatory behaviour and abusive use of judicial proceedings at stage 1.

Another interesting aspect of Portuguese arbitration law relates to the concept of international public policy. This is one of the matters in which the contradictory influences of the French and German legal doctrine are very well illustrated. As we mentioned before, at stage 3, France will adopt an international public policy standard. In turn, Germany reviews an award with reference to a domestic public policy concept (*öffentliche Ordnung*).

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[91] *Supremo Tribunal de Justiça*, 9 July 2015.

[92] Article 51.

[93] Esteves de Oliveira (Coord.) (2014), p. 105.

Even though the LAV is inspired by French arbitration law, Portuguese legal tradition has always sown great deference to German public policy doctrine.[94] Thus, Portugal met this approach halfway and adopted a standard which refers to the "*international public policy of the Portuguese State*".[95] This concept was described by the Portuguese Supreme Court (*Supremo Tribunal de Justiça*) as referring to the "fundamental structural principles of Portugal's presence in the concert of nations".[96] This standard is considered to be closer to one of domestic nature than a truly international public policy standard.[97] The LAV does not allow parties to shape the negative effect regime at stage 1, nor to waive their right to apply for a set aside proceeding. This view is in line with its rather domestic concept on international public order.[98]

Given the similarity between the French and Portuguese regime, most of our previous commentaries to the former do also apply to the latter.

5.4 USA

5.4.1 Party autonomy and the presumptive intention of the parties

Sections 3 and 4 of Chapter 1 provide that a court shall, if one of the parties so requests, stay the trial of the action, "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement" (section 3) and "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue".

The US Kompetenz-Kompetenz regime has been primarily developed by case-law.[99] The guiding principle behind recent US court decisions has been the notion that arbitration is a

[94] See Menezes Cordeiro (2015), p. 443, for a view against international public policy.

[95] Articles 46(3)(b)(ii), 56(1)(b)(ii), and 54.

[96] Esteves de Oliveira (Coord.) (2014), p. 651. Supremo Tribunal de Justiça, 9 October 2003.

[97] Menezes Cordeiro (2015), p. 454.

[98] Article 46(5).

[99] Born (2009), p. 911.

matter of contract. Thus, the allocation of powers regarding the decision on jurisdictional objections is by and large a matter of interpreting the parties' intentions.[100]

Notwithstanding, the predominant view over many years was that jurisdictional disputes were a matter to be decided by courts and that previous judicial relief should always be available to a party objecting to the arbitral tribunal's jurisdiction.[101] The *AT&T* case[102] (1986) is often cited as one example which illustrates the latter approach.[103] However, AT&T should, in our view, be seen as the turning point in American case-law. Thus, it laid down the foundation for the later *First Options* judgment.

In *AT&T*, both the first instance court and the court of appeals held that it was for the arbitrator to decide whether the parties have intended, under the applicable collective bargaining agreement, to arbitrate the dispute. The Supreme Court, however, vacated the Seventh Circuit's decision and remanded the case. Nonetheless, Justice White wrote in his opinion that:

> "The principles necessary to decide this case are not new.(…)
>
> The first principle (…) is that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. (…)
>
> The second rule, which follows inexorably from the first, is that the question of arbitrability - whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance - is undeniably an issue for judicial determination. **Unless the parties clearly and unmistakably provide otherwise**, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." (emphasis added)

[100] Barceló (2017), p. 14.

[101] Born (2009), pp. 912-914.

[102] AT&T Technologies v. Communications Workers, 1986, April 7

[103] Born (2009), pp. 912-914.

Although the Supreme Court decided that the question of jurisdiction was for the court to decide, it also admitted that parties could agree otherwise, provided that their intention was "clear and unmistakable".

This reasoning paved the way for the US Supreme Court judgment in the *First Options* case[104] (1995). Here the court dealt with the question of which standard to apply in reviewing the arbitrators' decision on "arbitrability" (arbitrability in the US sense corresponds to jurisdiction and not to whether a certain dispute is capable of being decided by arbitration, as in Europe). Nonetheless, in answering that question, the court mentioned in obiter dicta which approach a court should follow at stage 1:

> "the answer to the "who" question (i. e., the standard-of-review question) is fairly simple. Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute (…) so the question "who" has the primary power to decide "arbitrability" turns upon what the parties agreed about that matter".

Hence, if parties had agreed to submit jurisdiction ("arbitrability") to arbitration, then the courts' standard of review at stage 3 should be the same limited review as the one used to review the merits: namely a "manifest disregard" standard, as provided in section 10 of the Federal Arbitration Act.

However, courts should not assume that the parties agreed to arbitrate jurisdiction unless there was "clear and unmistakable" evidence that they did so.

If, on the other hand, parties did not submit jurisdiction to arbitration, then a court should decide the matter *de novo*. *First Options* presumes that, in the absence of any clear and unmistakable agreement in this regard, parties would have intended jurisdiction to be decided by a court. The argument was that parties "might not focus upon that question or upon the significance" of having arbitrators decide their own jurisdiction.[105] In fact, *First Options*

[104] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 1995.

linked the US negative effect regime to the parties' presumptive, or expressed, intentions on this matter.

Later US Supreme Court decisions introduced some caveats to the First Options rules. In *Howsam*[106] (2002), the Supreme Court addressed the question whether the application and interpretation of a contractual limitation period was to be primarily decided by a court or by arbitrators.[107] The controversy regarded a provision contained in the National Association of Securities Dealers (NASD) Code which provided that no dispute should be eligible for submission "where six years had elapsed from the occurrence or event giving rise to the dispute". On this matter, the court held that questions of procedural arbitrability are presumptively for the arbitrator to decide, while issues of substantive arbitrability are presumptively to be decided by courts. In this regard, procedural arbitrability would include "allegations of waiver, delay, or a like defense to arbitrability", while substantive arbitrability would relate to issues like the validity, existence and scope of the arbitration agreement. In general, "an arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled", such as time limits, notice, laches, estoppel and others. The court reasoned that parties are likely to expect an arbitrator to decide such "gateway matters" and that the NASD arbitrators are "comparatively more expert about the meaning of their own rule" and are therefore in a better position to interpret and apply the latter.

Lastly, it must be highlighted that US courts have an important discretionary power to stay litigation and refer the matter to arbitration, even when a jurisdiction issue would be presumptively for courts to decide, under the case law established by *First Options* and *Howsam*. The exercise of such discretionary power will normally take several factors into account, such as the efficiency of proceedings, the prejudice to either party, the credibility of the challenge, the expertise of arbitrators, the applicable law or the nature of the dispute (whether only legal or also factual issues involved).[108] If, however, judicial proceedings are stayed at stage 1, the courts will perform a de novo review at stage 3.[109]

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[106] Howsam v. Dean Witter Reynolds, Inc., 37 U.S. 79, 2002.

[107] Born (2009), p. 920.

[108] *Idem*, p. 949.

All in all, under the US regime, validity, existence and scope issues will be presumptively for a court to decide, while conditions precedent to arbitration, such as time limits, notice, laches and estoppel for arbitrators. Note that the US have implemented a some sort of binding Kompetenz-Kompetenz. Once a jurisdictional issue is primarily to be decided by arbitrators, courts will use a "manifest disregard" standard (the same used to review the merits) to review an arbitral award in set aside or recognition and enforcement proceedings.

One the one hand, it seems reasonable to assume that parties would have intended certain conditions precedent, such as time limits and waiver to be decided by arbitrators. The existence and the validity of the arbitration agreement are not in dispute. So, it could be argued that the legitimacy of the arbitral proceedings is not threatened. However, parties will not have the right to have jurisdiction reviewed at set aside and recognition and enforcement proceedings. On this matter, it is unwarranted to assume on the basis of their presumptive intentions, that parties have waived to their rights to set aside or refuse enforcement of the award. In our view, such presumption goes too far. A waiver to rights of appeal should be necessarily rely on an express agreement between the parties.

Notwithstanding the above, US courts have a discretionary power to stay litigation. In our view, such discretionary power should be used in order to refer, under exceptional circumstances, scope issues to arbitrators. Our view on this matter will be further explained below.

Finally, the US Supreme Court has delivered a troubling judgment in *BG Group,*[110] which will excessively enhance US binding Kompetenz-Kompetenz. In *BG Group*, the Supreme Court presumed that the parties intended the arbitral tribunal to decide about existence, validity and scope issues ("substantive arbitrability") based on the fact that they adopted UNCITRAL Arbitration rules, which contained a provision establishing the positive effect (not the negative) of Kompetenz-Kompetenz.[111] The consequence of the *BG Group* judgment

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[109] *Idem*, p. 953.

[110] BG Group PLC. v. Republic of Argentina, 2014.

[111] Article 23(1) of the 2010 rules provided: "The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."

will be that courts will not have any say on both substantive and procedural arbitrability whenever parties adopted institutional arbitration rules with a positive effect provision. In this regard, it must be noted that the positive effect of Kompetenz-Kompetenz does not grant arbitrators the power to decide jurisdiction with finality, nor does it relate to the question about who should have the first word on jurisdiction.[112] Rather, it only entitles arbitrators to decide on jurisdiction at stage 2. The *BG Group* judgement is therefore surprising.

5.4.2 The unenforceability problem of party autonomy

As we referred above, parties may change the presumptive rules of *First Options* and *Howsam* by mutual agreement ("jurisdiction agreement"). However there is a logical problem inherent to such power. As correctly questioned by Barceló: "If one party claims that the putative arbitration agreement either does not exist or is invalid, how could that very arbitration agreement determine *ex ante* who should decide those claims?".

The point is that the jurisdiction agreement will be itself disputed when the validity or the existence of the arbitration agreement is called into question. Probably, such agreement would only be enforceable if the jurisdiction agreement was agreed in a separate and autonomous clause of the container agreement and only if the validity (and not the existence) of the arbitration agreement was being disputed.

5.5 England

5.5.1 Discretionary approach

England plays an important role in the international arbitration scene. International contracts are predominantly drafted in the English language and English law is often used to mediate international commerce, as London one of the world's main seats of international arbitration.[113]

England modernised its arbitration laws with the enactment of the 1996 Arbitration Act, which clarified previous statutory provisions and codified principles developed by case law. Nevertheless, common law still plays an important role in interpreting and applying the

[112] Rau (2005), p. 465.

[113] See Sheppard (2015).

provisions of the Arbitration Act.[114] England has not adopted the text of the Model Law, but in many ways it has followed its structure and taken many of its provisions into account.[115]

The new arbitration law does not provide a clear-cut rule on the negative effect doctrine.[116] Section 9(4) of the Arbitration Act resembles article II(3) of the New York Convention. Thus, at stage 1, a party may apply to the court to stay the judicial proceedings, which shall grant a stay unless satisfied that the arbitration agreement is "*null and void, inoperative, or incapable of being performed*".

Consequently, section 9(4) leaves the question open as to whether the courts should give any priority to arbitrators on disputes regarding jurisdiction. However, English case law has not developed a clear-cut answer to this question, since the courts preferred to apply a discretionary approach to the negative effect principle.[117]

In this regard, *Birse Construction* is one of the landmark cases[118]. Birse Construction, a private construction company, brought a legal action in court against St David Ltd. in order to recover payment for the construction of luxury apartments in Cardiff Bay. The defendant argued that the parties entered into an arbitration agreement and requested the court to stay the proceedings under section 9. The claimant contended that there should be no stay of the proceedings unless the court was satisfied that there was clearly an arbitration agreement.

Birse Construction refers to four possible approaches a court may adopt under section 9[119]:

(1) To determine (with full review) on the evidence before it that:

a) an agreement exists in which case a stay must be granted; or that

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[114] Sheppard, (2015), p. 977.

[115] Blackaby & Partasides (2015), p. 61.

[116] Section 30 enshrines the positive effect of Kompetenz-Kompetenz, referring that, unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, namely as to (i) whether there is a valid arbitration agreement, (ii) whether the tribunal is properly constituted, and (iii) what matters have been submitted to arbitration in accordance with the arbitration agreement. Any ruling made by the arbitral tribunal on that matters is subject to subsequent judicial review.

[117] Brekoulakis (2009), p. 247.

[118] Birse Construction Ltd. V. St. David Ltd, 2000.

[119] Approaches were summarised in the case Fiona Trust & Holding Corporation and Others v Privalov, 2007.

b) no arbitration agreement exists and dismiss the application to stay;

(2) If the written evidence is not sufficient:

a) to stay the proceedings and let arbitrators determine their own jurisdiction; or

b) to not decide the issue and refer the issue as to whether an arbitration agreement exists to trial.

In this context, *Birse Construction* established criteria which should apply when the evidence before a court did not suffice to take a decision on jurisdiction. These criteria should therefore guide courts in deciding between option (2)(a) or (2)(b). They were as follows:[120]

(i) issues regarding the existence of an arbitration agreement should generally be for a court to decide (especially before arbitration has commenced), unless, for example, it is "virtually certain" that there is an arbitration agreement;

(ii) scope issues are most appropriately dealt with by the arbitral tribunal; and

(iii) a court should consider the likelihood that an award on jurisdiction will be challenged in court because it will not be in interest of the parties to have to return to the court to get a definitive answer to a question. Unnecessary delay and expenses should be avoided.

A different view on this matter has been presented in the *Albon* case.[121] In this case, the High Court of Justice had to decide whether the objection that the claimant's signature on the arbitration clause was forged should be decided by the courts or be determined by the arbitrators. Justice Lightman, who delivered the judgment of the Court, established two thresholds as conditions precedent to grant a stay of court proceedings under section 9. Thus a court should be satisfied that:

(i) an arbitration agreement has been concluded; and

(ii) the issue in the proceedings is a matter which is to be referred to arbitration under the arbitration agreement.

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[120] These guidelines were approved on appeal by several court decisions, such as in Al Naimi v. Islamic Press Agency, 2001.

[121] Nigel Peter Albon v. Naza Motor Trading, 2007.

If this threshold is not met based on the written evidence before the court, the issue has to go trial for further presentation of evidence. However, the court "can stay the proceedings so that the arbitrators can decide the issue, but only by exercising **its inherent jurisdiction** and not by exercising any jurisdiction under Section 9. (…) Section 9(4) assumes that an arbitration agreement has been concluded and it provides for the situation whether that concluded agreement is or may be in law "null and void, inoperative or incapable of being performed.". (emphasis added)

According to *Albon*, section 9(4) does not allow the stay of proceedings when the existence of the arbitration tribunal is being disputed. Therefore, proceedings could only be stayed when a court confirmed that an arbitration agreement had been entered into by the parties. The first argument put forward for this conclusion was "that the Rule of Law in general and subject only to limited exceptions requires that a party should not be barred from access to the court for the resolution of disputes unless the grounds for such bar are established. A bar on the ground of the alleged conclusion of an arbitration agreement (in general and subject only to limited exceptions) is not established unless and until the court has ruled on the issue whether it has been concluded."

The second argument relates to the fact "the compelling factors requiring respect for the terms agreed regarding arbitration do not come into play with their full force and effect", unless the arbitration agreement has been concluded.

However, in *Albon*, the Court argues that a court would be allowed to stay proceedings when the existence or scope of the arbitration agreement is being disputed, by exercising its discretionary and "inherent jurisdiction". According to the High Court, such inherent jurisdiction should be exercised only in very exceptional cases and take several factors into account. These factors are very similar to the ones mentioned in *Birse Construction*:

(i) A court should take into account whether the arbitration proceedings have been commenced prior to the court proceedings; and whether the decision of the arbitrators would be subject to judicial review.

(ii) Regarding issues as to the existence of an arbitration agreement, the court should only grant a stay if, for example, "*it is virtually certain that the arbitration agreement was concluded*".

(iii) When the scope of the arbitration agreement is in dispute, the court could stay the proceeding if the scope was found to be "*closely bound with the issues in the arbitration*."

As a matter of fact, *Albon* and *Birse Construction* have very similar practical outcomes. If courts do not have evidence that an arbitration agreement exists, the matter will in principle be decided by courts, unless special circumstances suggest otherwise (v.g. that is virtually certain that an arbitration agreement was concluded). The differences reside on a rather theoretical level. According to *Birse Construction*, Section 9(4) allows a court, under certain circumstances, to stay the proceedings regarding the existence of the arbitration agreement, while *Albon* argues that a stay judicial proceedings in those cases would only be possible by the the court's exercise of its inherent jurisdiction.

The only somehow contradictory outcome relates to the approach given to scope issues. While in *Birse Construction*, a scope question would arguably be decided by an arbitrator in most cases, in *Albon* scope issues are not covered by section 9 and can only be referred to arbitration in the exceptional cases in which the courts exercise their inherent jurisdiction to stay the proceedings.

5.5.2 Criteria for allocating competences

Under the foregoing case law, English courts will under normal circumstances decide whether an arbitration agreement exists. On this matter, *Albon* shared our concerns regarding the legitimacy of the arbitral proceedings. When it is not clear whether an arbitration agreement has come to into existence, there is no legal support to oust the jurisdiction of courts. *Albon* refers that barring a party access from court without an established ground for such bar would violate the principle of the "Rule of Law".

However, English courts admit that under exceptional circumstances a court may stay proceedings even when existence issues are at stake. In those cases, the court should take into account whether arbitration proceedings have already commenced and if it is "virtually

certain" that an arbitration agreement has been entered into between the parties. In addition, a court should consider the likelihood that an award on jurisdiction will be challenged in order to avoid unnecessary delay and expenses.

In our view, these criteria cannot justify a stay of the proceedings on the matter of the existence of the arbitration agreement. It must be noted that these criteria are essentially speculative.

The premise of the first criterion (whether arbitration proceedings have already commenced) is that an objection to the existence of the arbitration agreement is less likely to be legitimate if arbitration proceedings have already commenced. However, a party objecting to jurisdiction may have refused to participate in the arbitral proceedings. In addition, the mere fact that a party appoints an arbitrator and exercises its right of defence does not mean it has agreed to the arbitrators' jurisdiction.

In addition, it is not clear in which cases it may be considered to be "virtually certain" that an arbitration agreement exists. Anyway, a party should not be barred from court based on any standard of probability.

A court should consider the likelihood that an award on jurisdiction will be challenged in order to avoid unnecessary delay and expenses. As we mentioned earlier, the possibility to challenge a preliminary award on jurisdiction should not be used as an argument to confer arbitrators greater priority at stage 1, since arbitrators will only be able to render a preliminary award when the issue of jurisdiction is not related with questions of fact and law concerning the merits of the dispute. Lastly, court proceedings will not necessarily delay arbitration, which may continue while legal action is pending in court.

Finally, case law have not addressed the hypothesis in which only the validity of the arbitration agreement is called into question. However, commentators argue that courts have been recently giving precedence to arbitrators to examine issues related to the validity of the arbitration agreement.[122]

[122] Brekoulakis (2009), p. 248.

5.5.3 Scope issues

The objection that the disputed issue is not within the scope of the arbitration agreement is one of the most common grounds invoked to object to arbitrators' jurisdiction.[123] *Albon* and *Birse Construction* disagree on who should have the first word on scope issues. While *Birse Construction* considers that scope issues are most appropriately dealt with by the arbitral tribunal, *Albon* seems to prefer that scope is dealt with by courts.

Under US case law, scope is considered to be a "substantive" issue of jurisdiction and would be therefore for initial judicial determination. However, there are reasons which suggest the opposite view. If we take the criterion of the presumptive intention of the parties, used in *First Options* and *Howsam*, it may be argued that parties would generally expect arbitrators to assess the precise scope and reach of their arbitration agreement.[124] A decision regarding the scope of an arbitration agreement is deeply connected with the interpretation of the parties' agreement, which can be seen as part of the tribunal's "conceded mandate" and function.[125] Furthermore, arbitrators can be "comparatively more expert about the meaning" and scope of arbitration clauses.

In addition, giving arbitrators the first word over scope issues does not seem to rise any legitimacy concerns. The dispute over scope starts from a completely different starting point, when compared to the case where the existence or validity of the arbitration agreement is contested.[126] Parties have validly agreed to arbitrate their disputes. The dispute is limited to the precise reach of the terms agreed between the parties. Therefore, we understand that giving arbitrators priority over scope issue does not put into question the parties' fundamental right of access to courts.

Moreover, scope issues are not directly mentioned in the "null and void, inoperative or incapable of being performed" exception, found in the Model Law, the New York Convention and in most national arbitration laws. In contrast, the Model Law and the New York

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[123] Born (2009), p. 931.

[124] I*dem*, p. 932.

[125] I*dem*, p. 893.

[126] *Idem*, pp. 892-893.

Convention provide that an award will be set aside (only Model Law) or refused its enforcement (both Model Law and New York Convention) when "the award deals with a dispute not contemplated by or falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration".[127] These distinctive elements can support the argument that scope issues would be primarily for arbitrators.[128]

Notwithstanding the above, a court should under certain circumstances have the discretionary power to perform a full judicial determination of scope issues, instead of referring the matter to arbitration. A court would be advised to exercise such power if, for example, the arbitration tribunal had not yet been constituted and if it appeared highly likely or it was manifest that the dispute did not fall within the arbitration agreement (v.g. if the arbitration agreement had a narrow scope). In those cases it would probably be more cost-effective for a court to make an early judicial determination on the matter. As Gary Born has pointed out, "arbitral proceedings can take months to constitute a tribunal, can last several years before a final award and can cost very substantial amounts of money and other resources.[129]

6. CONCLUSIONS

6.1 Proposal for a restrictive approach on the negative effect doctrine

6.1.1 Full judicial review on validity and existence issues

The idea that courts should grant arbitrators priority, or even exclusivity, on objections regarding the validity or existence of an arbitration agreement is gaining increasing support in the international arbitration community. It is claimed to be an evidence of a country's "pro-arbitration" bias.[130]

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[127] Article 34(2)(a)(iii) and 36(1)(a)(iii) of the Model Law, and 5(1)(c) of the New York Convention.

[128] Born (2009), p. 892.

[129] *Idem*, p. 975.

[130] See Gaillard (2011).

Leaving aside France, which developed the concept of the negative effect of Kompetenz-Kompetenz, countries like England, United States and Portugal have been evermore restricting the powers of national courts to decide on jurisdiction when the existence or validity of an arbitration agreement is raised by the defendant.

While positive Kompetenz-Kompetenz only strengthens the jurisdiction of arbitration tribunals and is based on sound policy grounds, a strong version of negative effect of Kompetenz-Kompetenz entails a disproportionate restriction of national court's powers.

Even though article 2(3) of the New York Convention seems to have intended courts to perform a full review at stage 1, French and Portuguese courts will only assess whether there is any "possibility" or "plausibility" that a valid arbitration agreement has been entered into between the parties. In fact, French courts will not perform any review when the arbitration tribunal has not yet been constituted. In turn, English courts will give arbitrators priority on objections regarding the existence of the arbitration agreement based on speculative criteria, such as when they find that it is "virtually certain" that an arbitration agreement exists. Lastly, US courts will presume that parties intended arbitrators' to decide jurisdiction with finality (i.e. without any further court review), including existence, validity and scope issues, when parties have adopted institutional arbitration rules containing a positive effect provision.

All these practices set inappropriate thresholds for an arbitration agreement to oust the jurisdiction of courts. Consequently, countries will force parties, who have not have agreed to arbitrate, to participate in arbitral proceedings. By denying those parties their day in court, national jurisdictions are disproportionately limiting parties' fundamental right to have access to court.[131] In fact, a party should only be barred from court unless it has been found, under a full scrutiny review, that a valid arbitration agreement exists. Otherwise, the legitimacy of the arbitral proceedings will be put at risk.

A full judicial review of the arbitration agreement should also be performed when the existence (as opposed to the validity) of the main commercial agreement is being challenged by one of the parties. The doctrine of separability will generally only protect an arbitration

[131] Born (2009), p. 977.

agreement when the validity (as opposed to the existence) of the container agreement is being questioned.[132]

Those who argue in favour of a strong negative effect, claim that the rule is an important instrument to avoid delay of arbitration proceedings due to dilatory challenges.[133] However, delay will be minor, if arbitral proceedings are allowed to proceed while court action is pending. Another argument in favour of negative effect would be that judicial proceedings could be centred at the seat of the arbitration. However, jurisdictions are increasingly allowing parties to previously waive their rights to set aside proceedings. Thus, increasing delocalisation of arbitration might be going into an opposite policy direction, namely of abolishing any court control at the seat. Lastly, the argument that the inherent legitimacy risks of the negative effect doctrine could be offset by an early challenge of the preliminary award cannot be accepted. Arbitrators will only be able to render preliminary awards when the analysis related to jurisdiction is not connected with questions of fact and law regarding the merits of the dispute. Thus, early judicial relief will not be certain.

6.1.2 Negative approach to scope issues and to preconditions to arbitration

As we have suggested above, scope issues could be first decided by arbitrators. Such approach would, in our view, not rise legitimacy concerns, since there would be no question as to whether a valid arbitration agreement exists. The dispute is limited to the precise reach of the terms agreed between the parties, which is a matter closely connected to the arbitrators' function of interpreting the parties' agreement.[134] Furthermore, it is reasonable to expect that arbitrators will normally have more expertise in interpreting arbitration clauses.

The different treatment given to scope issues in the New York Convention and Model Law appears to suggest such approach. The review whether an arbitration agreement is "null and void, inoperative or incapable of being performed" does not encompass scope questions. However, both the Model Law and the New York Convention provide that an award can be set aside (Model Law) or refused its enforcement (both Model Law and New York

[132] See Mayer (1999), p. 263.

[133] Gaillard & Savage (1999), p. 410.

[134] Born (2009), p. 893.

Convention) when the award dealt with a dispute beyond the scope of the arbitration agreement.[135]

However, a court should have the discretionary power to perform a full judicial determination on scope when it would be more appropriate and cost-efficient to do so, such as in the case where an arbitration tribunal had not yet been constituted and it appeared highly likely or manifest that the dispute did not fall within the arbitration agreement (v.g. arbitration agreement with a narrow scope). In those cases it might be beneficial to perform a full judicial determination on the matter, instead of wasting the costs and time of having to appoint arbitrators and constitute the arbitral tribunal.

A similar approach to one describe above could also be adopted to decide matters of "procedural" jurisdiction"[136]. Arbitrators could be given priority on procedural preconditions for the use of arbitration, such as time limits, waiver, laches or estoppel. In this case, parties have validly agreed to arbitrate the dispute at hands. It is only disputed whether the right to arbitrate can still be exercised. A court should, however, decide such matters under a full scrutiny standard if it would be more appropriate and cost-efficient.

Courts could also take into account whether an arbitral award would be intended to be enforced in the country where the judicial proceeding are taking place. A judgment in the country of recognition and enforcement can be more important for the enforceability of the arbitral award than any control at the seat, which has no mandatory extraterritorial effect under article 5(1)(e) of the New York Convention.

6.2 Party autonomy

Countries should not accomplish stronger efficacy and efficiency of arbitral proceedings by neglecting the parties' fundamental right of access to justice. In turn, they should grant parties greater autonomy to pursue that purpose by their own.

In fact, there are still many countries which perceive that greater party autonomy would infringe their domestic public order. For example, Germany has disallowed Kompetenz-

[135] Articles 34(2)(a)(iii) and 36(1)(a)(iii) Model Law, and 5(1)(c) New York Convention.

[136] The kind of procedural arbitrability mentioned in Howsam v. Dean Witter Reynolds, Inc., 37 U.S. 79, 2002.

Kompetenz clauses because it considered not to be within the disposition of the parties to limit the judicial review of arbitrator's jurisdiction.[137] On this matter, we argued that countries should adopt international concepts of public order, which are more appropriate to address the international nature of arbitration. Arbitration should not suffer under each country's national idiosyncrasies. An international view of public would allow for greater party autonomy. In fact, countries such as France, Belgium, Sweden and Switzerland already allow parties to waive in advance to any set aside proceedings.[138] Such waiver would avoid duplication of judicial proceedings and would argue against the purpose of the negative effect doctrine to centre all litigation at the country of the seat. In fact, waiver of set aside proceedings would call for strong judicial determination of jurisdiction by courts at stage 1, possibly even on matters such as scope and procedural jurisdiction. If parties waive their right to set aside, a party would, in the absence of full judicial determination at stage 1, only have the possibility to challenge the jurisdiction of arbitrators by refusing enforcement of the award (unless arbitrators would have themselves denied jurisdiction).

In turn, a way to improve the efficiency of court proceedings at stage 1 would be to allow parties to waive their right to judicial appeal. As Dalhuisen correctly stated, "one of the primary aims of arbitration is to do away (a) with procedural formalism and (b) the facility of appeal. Professional parties, who are usually the litigants in arbitration, do not need them or want them and do not see in them a guarantee for better dispute resolution or greater justice."[139] For example, the Portuguese Code of Civil Procedure expressly allows parties to waive in advance their right to judicial appeal.[140] By waiving their rights to appeal, parties would obtain a judgment with *res judicata* effect regarding jurisdiction in less time. An express provision contained in the arbitration agreement to waive judicial appeal would not have the same logical problem as the jurisdiction agreements envisaged by *First Options*, at least when a valid arbitration agreement was entered into between the parties. Thus, if a court finds that a valid arbitration agreement exists, such judgment will be immediately delivered

[137] Ahrend (1996), p. 25.

[138] Poudret & Besson (2007), p. 385.

[139] Dalhuisen (2016), p. 398.

[140] Article 632(1).

with *res judicata* effect. Such waiver would, therefore, be especially effective in avoiding dilatory and illegitimate claims regarding jurisdiction.

As we mentioned in our introduction, the international arbitration community should continuously strive towards a stronger transnationalisation of its arbitration regime and establish international standards of control, such as regarding public order. In that case, parties would be able to improve the efficacy of arbitration proceedings by recourse to private autonomy. I suspect that course of action would be the beginning of the end of the controversial doctrine of the negative effect of Kompetenz-Kompetenz.

REFERENCES

Ahrendt, A. (1996). *Der Zuständigkeitsstreit im Schiedsverfahren*. Tübingen: J.C.B. Mohr (Paul Siebeck).

Barceló III, J. J. (2017). Kompetenz-Kompetenz and its negative effect: A comparative view. Cornell Legal Studies Research Paper No. 17-40. Available at SSRN: https://ssrn.com/abstract=3035485

Barceló III, J. J. (2003). Who decides the arbitrators' jurisdiction? Separability and competence-competence in transnational perspective. *Vanderbuilt Journal of Transnational Law, 36*(1115), 1116-1136.

Bensaude, D. (2015). French Code of Civil Procedure (Book IV: Arbitration). In L. A. Mistelis (Ed.), *Concise international arbitration* (pp. 1133-1188). Alphen aan den Rijn: Kluwer Law International.

Blackaby, N., & Partasides, C. (2015). *Redfern and Hunter on international commercial arbitration* (6th Edition). Alphen aan den Rijn: Kluwer Law International.

Born, G. B. (2009). *International commercial arbitration* (2nd edition). Alphen aan den Rijn: Kluwer Law International.

Bosch, W. (1989). BGH, 26. 5. 1988 — III ZR 46/87. Zur Kompetenz-Kompetenz-Klausel im Rahmen einer Schiedsvereinbarung. *Juristen Zeitung, 44*(4), 201-203.

Brehm, W. (2005). BGH, 13. 1. 2005 — III ZR 265/03 (Anmerkung). Zur Kompetenz-Kompetenz von Schiedsgerichten. *Juristen Zeitung, 60*(19), 958-960.

Brekoulakis, S. (2009). The negative effect of compétence-compétence: The verdict has to be negative. *Austrian Arbitration Yearbook*, Queen Mary School of Law Legal Studies Research Paper No. 22/2009, 238-258.

Dalhuisen, J. (2016). *Dalhuisen on transnational comparative, commercial, financial and trade law*, Volume 1 (6th Edition). Oxford and Portland: Hart Publishing.

Esteves de Oliveira, M. (Coord.) (2014). *Lei da arbitragem comentada*. Coleção Vieira de Almeida & Associados. Coimbra: Almedina.

Gaillard, E., & Savage, J. (1999). *Fouchard Gaillard Goldman on international commercial arbitration.* Kluwer Law International.

Gaillard, E. (2011). France adopts a new law on arbitration. *New York Law Journal, 254*(15).

Huber, P., & Bach, I. (2015a). Commentary on the German arbitration law (10th Book of the German Code of Civil Procedure), Chapter IV: Jurisdiction of Arbitral Tribunal, Section 1040. In K.-H. Böckstiegel, S. M. Kröll, & P. Nacimiento (Eds.), *Arbitration in Germany: The model law in practice* (2nd Edition; pp. 215-225). Alphen aan den Rijn: Kluwer Law International.

Huber, P., & Bach, I. (2015b). Commentary on the German Arbitration Law (10th Book of the German Code of Civil Procedure), Chapter II: Arbitration Agreement, Section 1032. In K.-H. Böckstiegel, S. M. Kröll, & P. Nacimiento (Eds.), *Arbitration in Germany: The Model Law in Practice* (2nd Edition; pp. 116-132). Alphen aan den Rijn: Kluwer International.

Lew, J. D. M., Mistelis, L. A., & Kröll, S. M. (2003). *Comparative international commercial arbitration.* The Hague: Kluwer Law International.

Lima Pinheiro, L. (2005). *Arbitragem transnacional, a determinação do estatuto da arbitragem*. Coimbra: Almedina.

Mayer, P. (1999). The limits of severability of the arbitration clause, Volume 9. In A. J. van den Berg (Ed.), *Improving the efficiency of arbitration agreements and awards: 40 years of application of the New York Convention,* ICCA Congress Series (pp. 261-267). The Hague: Kluwer Law International.

Menezes Cordeiro, A. (2015). *Tratado da arbitragem, em comentário à Lei 63/2011, de 14 de dezembro.* Coimbra: Almedina.

Moura Vicente, D. (2014). National report for Portugal. In J. Paulsson & L. Bosman (Eds.), *ICCA International handbook on commercial arbitration* (pp. 1-40). Kluwer Law International.

Poudret, J., & Besson, S. (2007). *Comparative law of arbitration* (2nd edition). London: Sweet & Maxwell Ltd.

Rau, A. S. (2005). The culture of American arbitration and the lesson of Adr. *Texas International Law Journal*. Available at SSRN: https://ssrn.com/abstract=721023

Sheppard, A. (2015). English Arbitration Act (Chapter 23). In L. A. Mistelis (Ed.), *Concise international arbitration* (2nd edition; pp. 977-980). Alphen aan den Rijn: Kluwer Law International.

Smid, S. (1996). Kompetenz-Kompetenz der Schiedsgerichte und Autorität des Schiedsrichters. *Deutsche Zeitschrift für Wirtschafts- und Insolvenzrecht, 6*(2), 52-59.

Varady, T., Barceló, J., Kröll, S. & von Mehren, A. (2015). *International commercial arbitration: A transnational perspective* (6th edition). American Casebook Series.

TABLE OF CASES AND ARBITRAL AWARDS

France

Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic, YCA 1979, at 177 et seq.

Cour de cassation, Copropriété maritime Jules Verne et autres v Société ABS American bureau of shipping, 7 June 2006.

Cour de Cassation, Lopez-Alberdi, 9 October 2001.

Cour de Cassation, Bomar Oil, 9 November 1993.

Cour d'appel Paris, Comptoir Commercial Blidéen, 13 September 2007.

Cour de Cassation, Société PT Putrabali Adyamulia v Société Rena Holding et Société Moguntia Est Epices, 29 June 2007.

Cour d'appel Paris, Intrafor, 12 March 1985.

Portugal

Supremo Tribunal de Justiça, 21 June 2016.

Supremo Tribunal de Justiça, 7 July 2016.

Supremo Tribunal de Justiça, 9 July 2015.

Germany

BGH 14.05.1952, Az.: II ZR 276/51.

USA

Supreme Court, AT&T Technologies v. Communications Workers, 7 April 1986.

Supreme Court, First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 1995.

Supreme Court, Howsam v. Dean Witter Reynolds, Inc., 37 U.S. 79, 2002.

Supreme Court, BG Group PLC. v. Republic of Argentina, 2014.

England

Court of Appeal, Birse Construction Ltd. V. St. David Ltd, 2000.

Court of Appeal, Fiona Trust & Holding Corporation and Others v Privalov, 2007.

High Court of Justice, Nigel Peter Albon v. Naza Motor Trading, 2007.